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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-24

UPPER ALLEGHENY SAND & GRAVEL CO., INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA and
SENECA NATION OF INDIANS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BENJAMIN C. PERREAULT,
CONGDON, CONGDON
& PERREAULT,
Attorneys for Petitioner,
107 Main Street,
Salamanca, New York 14779.

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INDEX.

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
1. The award of scrap value only made to the owner for its fixtures is contrary to the decisions of this Court, and the proper measure of just compensation for the taking of fixtures is a significant and recurring issue facing Federal Courts	7
2. The measure of just compensation due a lessee under a lease having a short remaining term presents an important question of Federal law which has not been but should be settled by this Court	9
3. The measure and method of arriving at just compensation where vandalism has occurred to property after the date of taking presents an important issue not previously directly decided by this Court and which is of concern to all owners having property condemned	10
4. The question of whether just compensation should be paid for bulky items of personal property which would lose all or nearly all value upon removal, such as stockpiles of processed sand and gravel, presents an important question of Federal law which has not but should be settled by this Court	11
5. The sanctioning by the Court of Appeals of the confiscatory award made by the District Court and of the admission of evidence of the price bid at the auction sale by the District Court in violation of an order of that Court, relied on by Petitioner, is such a departure from the accepted and usual course of judicial proceedings and is so wrong and unjust as to call for an exercise of this Court's power of review	13

PAGE

6. The case presents important questions on the proper method of valuing buildings, mineral lands and leasehold interests which are recurring issues in eminent domain cases 15

Conclusion 16

Appendix 17

Decision of the United States Court of Appeals for the Second Circuit 17

Decision and Order of the United States District Court for the Western District of New York 25

Judgment of District Court 36

TABLE OF CASES.

Armstrong v. United States, 364 U. S. 40 (1960) 12
Cole v. Ellwood Power Co., 216 Pa. 283, 65 A. 678 (1907) 12
Monongahela Navigation Co. v. United States, 148 U. S. 312 (1893) 8
Smithrock Quarry, Inc. v. State, 60 Wash. 2d 387, 374 P. 2d 168 (1962) 12
State, Dept. of Highways v. Gifford-Hill & Company, 158 So. 2d 448 (La. App. 2d Cir., 1963) 12
United States v. Dow, 357 U. S. 17 (1958) 10
United States v. General Motors Corp., 323 U. S. 373 (1945) 9, 11
United States v. Miller, 317 U. S. 369 (1943) 8, 10
United States v. 967.905 Acres of Land, Etc., Cook Co., Minn., 305 F. Supp. 83 (D. C. Minn. Fifth Div., 1969) 12
United States v. Petty Motor Co., 327 U. S. 372 (1946) 9, 11
United States v. Virginia Electric & Power Co., 365 U. S. 624 (1961) 8

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Upper Allegheny Sand & Gravel Co., Inc,, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 14, 1971.

Opinion Below

The opinions of the United States Court of Appeals for the Second Circuit and the United States District Court for the Western District of New York appear in the Appendix.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered April 14, 1971, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254 (1).

Questions Presented

1. The measure of just compensation for the taking of a lessee's fixtures, buildings and leasehold interest in a sand and gravel lease.

2. The effect of the length of the remaining term of the lease upon just compensation for the lessee's fixtures, buildings and leasehold interest.

3. Whether just compensation should be reduced because of vandalism to property occurring after the date of taking.

4. Whether just compensation should be paid for stockpiles of processed sand and gravel even though personal property.

5. Whether it was error for the District Court to admit and consider evidence of the price paid for the fixtures at a court ordered auction sale of the property occurring about two years after the date of taking and from the auctioneer who conducted the sale testifying as an expert witness as to value.

Constitutional and Statutory Provisions Involved

The just compensation clause of the Fifth Amendment to the Constitution of the United States which provides "nor shall private property be taken for public use, without just compensation."

Statement of the Case

Upper Allegheny Sand and Gravel Co., Inc., the petitioner in this case, held a sand and gravel lease from the Seneca Nation of Indians and certain Indian allottees covering 80 acres of land located on the Allegany Indian Reservation of the Seneca Nations of Indians. The United States appropriated permanent easements in this land for flooding in connection with the Allegheny Reservoir Project commonly referred to as the Kinzua Dam Project. The Upper Allegheny Sand & Gravel Co., Inc., hereafter called Upper Allegheny, owned a fixed sand and gravel processing plant and two buildings located upon the leased premises. The leased area was located entirely within the permanent pool to be created by the dam.

The lease was for a period of ten years commencing August 15, 1948, with a right in the lessee to extend the term an additional ten years. In 1958, the lease was so extended to August 15, 1968. The lease (at paragraph 8) granted the right to additional leases. The rental rate was five cents a ton which was conceded by all parties to be a favorable rate.

The complaint and the declaration of taking were filed on December 3, 1963, and the order for immediate delivery of possession was filed December 9, 1963. Upper Allegheny was allowed to stay in partial possession to wind up its affairs until November 14, 1964.

Beginning in 1958, just five years before the condemnation, Upper Allegheny made substantial improvements to its sand and gravel processing plant at a cost of about $100,000, including the installation of new, relatively expensive, major plant components. During the five year period immediately prior to the appropriation, from 1959

through 1963, Upper Allegheny's production and sales of sand and gravel were about 70,000 tons annually and approximately $105,000 in net sales annually. In each of these five years, after taking maximum deductions for depreciation and depletion, Upper Allegheny reported a net profit on its income tax returns, ranging from a low of $1,686.48 in 1959 to a high of $18,556.55 in 1960. During this same period, Upper Allegheny repaid approximately $100,000 in capital debt.

From the inception of the appropriation and throughout the proceedings, the U. S. Army Corps of Engineers adopted a hostile attitude toward Upper Allegheny's rights. The Corps initially claimed that the lease was invalid and that the processing plant was personal property and, therefore, refused to make any offer or negotiate with Upper Allegheny. They made no appraisal. Thus, Upper Allegheny had no deposit of money to withdraw to pay the expense of relocation and, in effect, was forced out of business in 1964 by this attitude.

The issue of just compensation was forced to await decision of the Government's motion to declare the lease invalid. Decision of this motion took until October 27, 1967, when the District Court determined that the lease was valid. By this time the leased land was under water.

In addition to disputing the validity of the lease, the United States took the position that the sand and gravel processing plant was personal property for which no just compensation was due and that it was Upper Allegheny's responsibility to remove the processing plant. In order that the plant might be removed so the site could be flooded, the United States, on May 13, 1965, made a motion to have the property sold and the sale price deposited with the

Court. On June 21, 1965, the parties stipulated that the buildings, the processing plant and the spare parts of the plant were real property and that the stockpiles of processed gravel were personal property. Pursuant to this stipulation an order was made on August 6, 1965, providing for the sale of the plant and stating which items were personal property and which were real property. On October 14, 1965, pursuant to the order, the removable items from the plant were sold by an auctioneer at public sale in place, the purchasers to disassemble and remove the items at the purchasers' expense. The sale price on a bulk basis was $8500 and on a piecemeal basis was $9060.00. By agreement of the parties the petition for the order (paragraph 8) and the order provided that the price realized at the sale was not to be used as evidence to determine value at the time of taking. On the trial, the United States was allowed by the District Court to violate this agreement by calling the auctioneer who testified to the price realized at the sale and to his opinion of the salvage value of the plant. This was in direct violation of the order entered by stipulation and was given over the strenuous objections of counsel for Upper Allegheny.

After appropriation and after Upper Allegheny vacated the premises but prior to the auction sale of the plant, vandals stole and destroyed many items from the plant, greatly reducing its value.

The issue of just compensation for upper Allegheny's property interest was tried by the District Court with the issue of just compensation to the Seneca Nation of Indians for the taking of certain tracts which the Seneca Nation of Indians claimed had a highest and best use as sand and gravel lands, including the tracts subject to Upper Allegheny's lease. The basis of the District Court's jurisdic-

tion was 28 U. S. C. § 1358. The trial was completed June 14, 1968. The evidence introduced by Upper Allegheny was that it was entitled to just compensation as follows: Processing Plant $161,450.00, Spare Parts Considered Real Property, $3803.34, Buildings $15,175.00, Leasehold Interests in Land $236,558.00, and Stockpiles $32,965.00 for a total of $449,951.34.

It was stipulated and provided by order that all the above items were real property except the stockpiles.

The Government offered no testimony of the value of the plant in place. Although the plant was stipulated to be real property and the order based on this stipulation so provided, the Government's proof did not treat the plant as real property. The real estate appraiser for the United States testified that at the time he made his appraisal he considered the sand and gravel processing plant as personal property and therefore made no appraisal of it; that the buildings had a value of $1500 which he later described as a "small token value" because of the short remaining term of the lease; and that the highest and best use for the land was for campsites. The auctioneer who conducted the sale testified that the plant would sell for what it sold for at the auction sale, and no testimony was offered by the Government as to the value of the stockpiles.

On May 4, 1970, the District Court decided this case. The decision was that Upper Allegheny was entitled to $9060.00 for its processing plant (including the spare parts), which was the exact amount bid and paid at the auction sale for the plant and spare parts. The Court further decided that Upper Allegheny was entitled to $3,000 for the buildings, but nothing for its leasehold interests and nothing for the stockpiles. The Court recognized that vandalism had oc-

curred but in effect took the position that the vandalism reduced the just compensation that the United States was required to pay. The Court held that the value of the 80 acres leased by Upper Allegheny was enhanced by the underlying sand and gravel deposits, but found that the other parcels owned by the Seneca Nation of Indians were not enhanced by the sand and gravel deposits. On August 30, judgment was entered, and thereafter Upper Allegheny Sand & Gravel Co., Inc., appealed to the Court of Appeals for the Second Circuit.

By opinion rendered April 14, 1971, the Court of Appeals affirmed the District Court judgment.

REASONS FOR GRANTING THE WRIT

1. The award of scrap value only made to the owner for its fixtures is contrary to the decisions of this Court, and the proper measure of just compensation for the taking of fixtures is a significant and recurring issue facing federal courts.

The District Court awarded Upper Allegheny $9060 for its fixtures, which was the exact amount the fixtures sold for on a piecemeal basis at the auction sale. This was an award of scrap or salvage value only for the processing plant. This allowed nothing for the many items such as foundations, ramps, underground piping, etc., that could not be removed and nothing for items of electrical wiring, etc., that would lose substantially all their value upon removal. This was an award of salvage value of the plant two years after condemnation rather than the value at condemnation.

An award of salvage value for fixtures is contrary to the general rules of just compensation. Just compensation

is determined by fair market value or some alternate fair standard, determined by "what the owner has lost, not what the taker has gained". "The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken". See *United States v. Miller*, 317 U. S. 369, 373-375 (1943); *United States v. Virginia Electric & Power Co.*, 365 U. S. 624, 633 (1961); and *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 325-326 (1893).

The measure of just compensation for the taking of fixtures is an issue often present in eminent domain cases. The measure of just compensation of fixtures, being real property, should be their value in place. The Government made no attempt to offer any proof of value of the fixtures in place. The District Court made no consideration of the value of the fixtures in place. The Court of Appeals decided that the District Court's decision could not be held clearly erroneous because conceivably the testimony of the auctioneer could be considered as testimony of the value of the plant in place. The auctioneer's testimony was very clearly limited to what the plant would sell for for salvage purposes. By giving his testimony as to salvage value some greater conceivable meaning, the Court of Appeals in effect allowed as just compensation, scrap value in Upper Allegheny's case.

To measure just compensation for the taking of fixtures by scrap value shocks the conscience to such an extent that this Court should prevent the Government from using such a method in this case and for the future.

2. The measure of just compensation due a lessee under a lease having a short remaining term presents an important question of Federal Law which has not been but should be settled by this Court.

Upper Allegheny's lease had a remaining term of about five years. It had a favorable rental rate as conceded by the United States Attorney and the expert witness for the lessor, the Seneca Nation (who allocated part of the land value to Upper Allegheny) and as stated by the Court of Appeals in its opinion. The District Court found the lands under lease to be sand and gravel lands. However, the Court of Appeals held that Upper Allegheny was not entitled to an award for its leasehold interest because of the shortness of the remaining term of the lease.

Under this line of reasoning, the "tail end" of most long term leases would have no value. We do not find where this point has been specifically covered by this Court but it is important issue to all lessees that should be decided by this Court. Upper Allegheny urged that the fair rental rate, as opposed to the actual rental rate, should be determined without regard to the length of the remaining term of the lease and the difference (or bonus rent) awarded the lessee. This Court, in its decisions, has previously discussed the just compensation to be paid lessees. See *United States v. Petty Motor Co.*, 327 U. S. 372, 378 (1946); *United States v. General Motors Corp.*, 323 U. S. 373 (1945). We submit that the length of the remaining term of a lease should not be considered in determining the fair rental rate. If the rate is favorable the lessee should be paid just compensation even if the remaining term of the lease is short.

3. The measure and method of arriving at just compensation where vandalism has occurred to property after the date of taking presents an important issue not previously directly decided by this Court and which is of concern to all owners having property condemned.

Damage due to vandalism often occurs to unoccupied properties after condemnation. The effect of vandalism on the measure of just compensation is important to any property owner whose property is condemned. The District Court held that vandalism, occurring after the date of vesting of title, reduced the just compensation due Upper Allegheny and that it was Upper Allegheny's responsibility to prevent vandalism. The rule is that just compensation is determined as of the date of taking, which occurs when the declaration of taking is filed or when possession is taken, whichever is done first, *United States v. Dow*, 357 U. S. 17 (1958) and *United States v. Miller*, 317 U. S. 369, 374 (1943). The Court of Appeals for the Second Circuit in its opinion held that Upper Allegheny had the responsibility of making separate proof of the value of the items damaged or taken by the vandals. The effect of this ruling is to deny just compensation for the items destroyed or reduced in value by vandalism. Upper Allegheny proved the value of all the items it owned as of the date of taking, including the items vandalized. It should have no responsibility of anticipating that the Government would limit its proof to the items remaining on the premises two years after taking as damaged by vandalism. The precedent established by the Court of Appeals' decision places an unfair burden on all property owners in a similar position in the future and deprives them of full just compensation. For these reasons it is important that this Court consider this issue.

4. The question of whether just compensation should be paid for bulky items of personal property which would lose all or nearly all value upon removal, such as stockpiles of processed sand and gravel, presents an important question of Federal Law which has not but should be settled by this Court.

It was stipulated that the stockpiles of processed sand and gravel were personal property. However, even though considered personal property, just compensation should be paid for the taking of the stockpiles.

The general rule is that when a real property interest is appropriated the owner is not entitled to just compensation for personal property located on the premises, *United States v. General Motors Corp.*, 323 U. S. 373, 379 (1945) and *United States v. Petty Motor Co.*, 327 U. S. 372 (1946).

The rationale is that because of its portable nature the personal property is not taken. But this general rule should have its exception in the case of ponderous personal property such as the stockpiles in question. Where the personal property by its nature is ponderous and would have less value removed than the cost of removal, just compensation for the land taken should include just compensation for this type of personal property. While not fixtures, this type of personal property is akin to fixtures.

In 1964 Upper Allegheny, while still in occupancy of the leased premises for the purpose of winding up its business, sold about ⅔ of its inventory on hand at the time of appropriation. However, in late 1964, it was required to give up possession with 36,054 tons of inventory unsold in stockpiles. Thereafter it had no loader and had no scales, had no regular employees and had lost its place of business. It still managed to sell at reduced prices another 15,039

tons, leaving 21,015 tons unsold. To load such material, haul it several miles to a new location, unload, acquire and prepare and pay the expenses of maintaining a new location would cost more than the value of the material in place. Many similar businesses will be faced with the same type of loss as a result of future condemnations.

In at least three instances, state courts have awarded just compensation to owners of similar personal property under similar circumstances, *Cole v. Ellwood Power Co.*, 216 Pa. 283, 291, 65 A. 678 (1907) (severed rubble backing stone at the quarry); *Smithrock Quarry, Inc. v. State*, 60 Wash. 2d 387, 374 P. 2d 168 (1962) (severed rock at the quarry); and *State, Dept. of Highways v. Gifford-Hill & Company*, 158 So. 2d 448, 451-452 (La. App. 2d Cir., 1963) (stockpile of sand).

Where land is taken and abandonment is the only reasonable alternative open to the owner of personal property located on the land taken, there is a taking of the personal property within the meaning of the Fifth Amendment for which just compensation is required. See *United States v. 967.905 Acres of Land, Etc., Cook Co. Minn.*, 305 F. Supp. 83 (D. C. Minn. Fifth Div., 1969) which allowed just compensation for cabin barges located on a remote lake and used in connection with appropriated land.

The issue is whether the loss of personal property of this type is a noncompensable consequence of a condemnation of land or a taking for which the Fifth Amendment requires just compensation. Drawing this line is difficult, *Armstrong v. United States*, 364 U. S. 40, 48 (1960). The issue is bound to arise often. Determination by this Court is of importance to both the Government and the many owners of this type of personal property.

5. The sanctioning by the Court of Appeals of the confiscatory award made by the District Court and of the admission of evidence of the price bid at the auction sale by the District Court in violation of an order of that Court, relied on by petitioner, is such a departure from the accepted and usual course of judicial proceedings and is so wrong and unjust as to call for an exercise of this Court's power of review.

The United States paid nothing for the taking of Upper Allegheny's sand and gravel processing fixtures. It should be emphasized that the $9060 paid upper Allegheny by the United States pursuant to the District Court's award had been received by the United States from those who bid in this property. What is this but confiscation?

In the five years before the appropriation, expensive, new, major components had been added to Upper Allegheny's processing plant at a cost of about $100,000.00. The plant produced and sold about 70,000 tons of processed sand and gravel annually, meeting the strict requirements of New York State and Pennsylvania Public Works specifications for fine and coarse aggregate.

Upper Allegheny was able to pay its debts, depreciate its capital expenditures at a rapid rate and still show a profit on its income tax returns for the five consecutive years before the appropriation. To sustain a finding that the property was worth only its salvage and scrap value was to condone confiscation.

For the purpose of clearing the area appropriated, on October 14, 1965, Upper Allegheny's sand and gravel processing plant was sold piecemeal at public auction pursuant to order of the District Court dated August 6, 1965. This order was made on stipulation of the attorneys for

Upper Allegheny and the then United States Attorney. The order provided that "the price realized at the sale shall not be used as evidence to determine value at the time of the taking by the Government". This provision of the order reflected an agreement made by the United States through the United States Attorney and was relied upon by Upper Allegheny. Because of vandalism to the plant which was recited at paragraph 3 of the petition for such order, the forced nature of the sale, and the lapse of time since appropriation, the attorneys who agreed upon this order realized that the sales price would not even reflect the true salvage value of the plant at the time of taking. The order provided that such plant was real property, and the parties through their attorneys agreed that the plant's value as real property should not be measured or influenced by this sale. Following the United States Attorney's appointment to the bench and withdrawal from the case, his successors at the trial violated the agreement formulated in such order and offered evidence of the price realized at the sale, using the auctioneer as a witness.

The District Court received such evidence over the objections of counsel for Upper Allegheny and considered and was greatly influenced by such evidence as the opinion shows.

This was a gross error and upon the appeal to the Court of Appeals for the Second Circuit this point was strongly urged in Upper Allegheny's brief, but, the decision of the Court of Appeals is silent on this point. By not considering the point the Court of Appeals has sanctioned a gross error detrimental to Upper Allegheny's basic rights, so basic and so detrimental that this Court should exercise its power of supervision.

6. The case presents important questions on the proper method of valuing buildings, mineral lands and leasehold interests which are recurring issues in eminent domain cases.

The District Court decision rejects reproduction less depreciation as a measure of valuing special purpose buildings of the type involved in this case for which there are ordinarily no comparable sales. The District Court arrived at the building value without applying any of the recognized methods of valuation and without explanation of the method it used. The Court of Appeals took the position that it could not say the award was clearly erroneous. The case presents these issues: (1) when the Court itself makes a determination of just compensation, is it required to explain the methods it used in arriving at its conclusion so that its conclusion can be reviewed? (2) does the Court have to follow the accepted concepts of appraisal evaluation? Similar issues are involved in the Court's conclusions as to the value of the land included in the lease. The District Court's evaluation of the buildings appears to be based on the shortness of the remaining term of the lease and whether this is proper is an issue. Another issue is the value of Upper Allegheny's right to additional leases for which no award was made. These, along with the questions as to the method of valuing fixtures and leasehold interests, present significant and recurring issues which are worthy of this Court's consideration.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

BENJAMIN C. PERREAULT,
CONGDON, CONGDON & PERREAULT,
Attorneys for Petitioner,
107 Main Street,
Salamanca, New York 14779.

June 30, 1971.

Decision of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v

1,132.50 ACRES OF LAND, ETC., UPPER ALLEGHENY SAND & GRAVEL CO., INC.,
Appellant.

No. 628—September Term, 1970.

(Argued March 23, 1971 Decided April 14, 1971.)

Docket No. 35516

Before: WATERMAN, KAUFMAN and HAYS,
Circuit Judges.

Appeal from award of $12,060 in condemnation proceedings before the United States District Court for the Western District of New York, John O. Henderson, Judge.

Affirmed.

Dennis M. O'Connell, Attorney (Shiro Kashiwa, Assistant Attorney General, Jacques B. Gelin, Attorney, Department of Justice, Washington, D. C., H. Kenneth Schroeder, United States Attorney, C. Donald O'Connor, Assistant United States Attorney, Buffalo, N. Y., of Counsel), for Appellee.

Benjamin C. Perreault (Congdon, Congdon & Perreault, Salamanca, N. Y., of Counsel) for Appellant.

Arthur Lazarus, Jr. (Patricia Roberts Harris, Strasser, Spiegelberg, Fried, Frank & Kampelman, Washington, D. C., of Counsel), for Defendant Seneca Nation of Indians.

KAUFMAN, *Circuit Judge:*

As part of the Allegheny River Reservoir (Kinzua Dam) Project in southwestern New York State, the United States in 1963 acquired by condemnation flowage rights and other easements on some 10,000 acres in the Allegheny Reservation of the Seneca Nation of Indians (Seneca). The United States and Seneca reached an accord on the fair market value of all but 1,345 acres of the land thus taken, and neither has appealed from the trial judge's determination of that dispute. The conflict which has our attention concerns eighty acres of the land which had been leased in 1948 to the Upper Allegheny Sand & Gravel Company (Allegheny) for 20 years and upon which it had erected a sand and gravel processing plant. Allegheny has assigned a number of errors in the calculation of the just compensation which it claims is due to it. Finding no reversible error, we affirm the district court's award.

1. *Fixtures*

After some hesitation, it appears that the United States stipulated in the court below that the bulk of Allegheny's plant equipment, consisting of permanently mounted crushing, washing, sorting, and conveying machinery, was compensable real property. The United States thus agreed in effect that the equipment could not be removed without substantial damage to itself or to the remaining real prop-

erty and was therefore a "fixture" under New York law.[1] Several witnesses testified that this equipment was poorly engineered, inefficient and of considerable age. It appears that some components were literally held together with baling wire. Moreover, the auctioneer who sold the equipment testified that Allegheny's plant was the smallest of the more than 100 that he had sold. The equipment was auctioned off on a piecemeal, buyer-to-remove basis for a total of $9060. Using this sum as an indication of fair market value Judge Henderson fixed that amount as representing just compensation.

It is well settled in this circuit that a tenant who has installed fixtures in property condemned by the United States need not content himself with their salvage value when the government has made their continued use in place impossible. See *United States v. Certain Property, Etc. (Il Progresso)*, 306 F.2d 439, 448 (2d Cir. 1962). See also *United States v. Certain Property, Etc. (Lafayette Nut Product)*, 344 F.2d 142, 146 (2d Cir. 1965); *United States v. Certain Property, Etc. (193 Realty Corp.)*, 388 F.2d 596, 600 (2d Cir. 1968) *(en banc)*. Because these fixtures diminish in value upon removal, a measure of damages less than their fair market value for use in place would constitute a substantial taking without just compensation. "[I]t would be intolerable that the state, after condemning a factory or warehouse, should surrender to the owner a

[1] New York law is relevant on this question not because it is binding upon federal courts under *Erie R. R. v. Tompkins*, 304 U. S. 64 (1938), but because federal substantive law takes the practical view that the state rule should be adopted. If federal courts insisted on developing a divergent body of law, property owners in planning their affairs would be compelled to take account of two conflicting rules of compensability, never knowing until the moment of taking which one governed. See *United States v. Certain Property, Etc. (Il Progresso)*, 306 F. 2d 439, 444-45 (2d Cir. 1962).

stock of secondhand machinery and in so doing discharge the full measure of its duty." *Jackson v. State,* 313 N.Y. 34, 35, 106 N.E. 758, 758 (1914) (Cardozo, J.).

Normally the value of trade fixtures for use in place will exceed their salvage value. But if a lessee has located or arranged his machinery or other fixtures in such a manner that their full economic potential cannot be realized on the premises, it is not inconceivable that the market will value them more highly for a better use elsewhere. This appears to have been the situation at Allegheny, for the government's auctioneer estimated the value of the fixtures "as an existing plant" to be only $8000-8500. Judge Henderson was well within his discretion in crediting the testimony of a witness with extensive knowledge of the market in sand and gravel plants.[2] The only alternative estimate provided by Allegheny's expert witnesses was the reproduction cost of the machinery, depreciated at what they considered a percentage appropriate to its age and condition. This method of approximating fair market value, while relevant, see 306 F.2d at 448, can hardly be determinative of the question. It does not take into consideration the possibility that under present market conditions the equipment would not be reproduced even at the depreciated price. See *United States v. Toronto, Hamilton & Buffalo Nav. Co.,* 338 U.S. 396, 403 (1949); *United States v. 55.22 Acres of Land,* 411 F.2d 432 (9th Cir. 1969).

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[2] The government witness did not state in these precise words that his $8000-8500 estimate represented the equipment's value for use in place. Other portions of his testimony, and the fact that the highest bulk bid at the auction was $8500, provide a basis for arguing that his evaluation was made on a buyer-to-remove basis. Nevertheless, the natural and most likely meaning of the phrase "as an existing plant" refers to use in place, and the trial court did not clearly err in understanding the testimony in this fashion.

Because the value of Allegheny's machinery for use in place was thus on the low side, the trial court quite properly exercised its judgment in awarding the higher piecemeal salvage value. Salvage value in a case such as this places a fairer value on the price of equipment. It represents, in effect, a sale between a willing buyer and willing seller.[3]

2. *Buildings*

Two buildings had been erected on Allegheny's based property in 1948. The "scale house" contained the equipment used in weighing loaded trucks as they left the plant, and the "power house" enclosed a diesel generator, the plant's sole source of power. Allegheny's experts, using the depreciated reproduction cost method once again, estimated their combined worth at $15,175. In giving little weight to this figure, the trial court could properly consider, in addition to the inherent limitations of this approach, the fact that the entire plant—equipment, buildings, and existing stockpiles—had been acquired from Allegheny's predecessor at a 1954 public foreclosure sale for only $20,000. *Cf.* 306 F.2d at 448. The government's expert appraiser testified that the buildings were worth no more than $1500 on the prevailing real estate market. Although this may have rested heavily on the relatively short five-year period remaining in Allegheny's lease,[4] *cf.*

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[3] Allegheny also complains that the trial court failed to account for vandalism that occurred after the declaration of taking but before the government's witness surveyed the plant, citing the recent decision of the New York Court of Appeals in *Chester Litho, Inc. v. Palisade Interstate Park Comm'n*, 27 N. Y. 2d 323, —— N. E. 2d ——, 317 N. Y. S. 2d 761 (1971). Since Allegheny failed to present any evidence concerning the extent or money value of the vandalism, the denial of this claim was proper.

[4] The witness testified that he had not calculated the worth of the buildings with mathematical precision "because I could not see any use for the buildings as buildings after the lease had expired."

United States v. Certain Property, Etc. (193 Realty Co.), 388 F.2d 596 (2d Cir. 1968) *(en banc)*, the court's award of $3000 was substantially higher than the government's expert calculated. We cannot say that Judge Henderson's award was clearly erroneous.

3. *Value of Lease*

The testimony of several witnesses established that the site could not be competitively exploited without a substantial new investment in a modern plant. There was testimony also that investment to make the plant competitive—estimated by one witness to be $250,000—would be totally unattractive to anyone on the basis of a short term five-year lease. That Allegheny managed to turn a small profit using its old and inefficient equipment is hardly conclusive proof to the contrary; indeed, the evidence credited by Judge Henderson indicated that a rational buyer of the plant would have sold the existing equipment on a piecemeal basis rather than continue using it. The trial court thus appropriately found that the remaining five year term of Allegheny's lease, despite its favorable rent of 5 cents per ton sold, had no market value.

Seneca's lease with Allegheny also granted an option to open two additional gravel pits on the Reservation on the same terms. Assuming *arguendo* that Allegheny could have exercised the option unilaterally, there was no evidence to indicate the economic feasibility of doing so and thus it remained sheer speculation. The court's conclusion that these rights had no market value was therefore entirely justified.

4. *Value of Stockpiles of Processed Sand and Gravel*

Allegheny ceased production in mid-1964, and continued selling its existing inventory of sand and gravel until April 1, 1967, when the backwaters of the Kinzua Dam flooded the area of the stockpiles. Because the high cost of relocating these bulk items made their removal to higher ground impractical, most of these "compulsory" sales, Allegheny argues, were made at artifically depressed prices. Despite all, some 21,000 tons of sand and gravel, said to be worth $25,000, remained and were submerged by the Allegheny River Reservoir.

The district court's denial of compensation for this loss was not erroneous. Under New York law, see note 1 *supra*, the sand and gravel were Allegheny's personal property rather than a "fixture" of the land for eminent domain purposes. Certainly, the sand and gravel could have been removed without damage to the freehold or the removed property, see p. 2423, *supra*. Although a lessee's costs of removing personal property from condemned premises may seem clearly attributable to the government's taking, we have not been cited to any case requiring the state to compensate for all adverse effects ultimately flowing from a condemnation. Indeed, both state and federal courts, including this court, see *In re Post Office Site*, 210 F.2d 832 (2d Cir. 1914), have traditionally denied compensation for the expense of moving personal property. See 4 Nichols, Eminent Domain § 14.2471[2], at 667-73 (Sackman 3d ed. 1962); *Gershon Bros. Co. v. United States*, 284 F. 849 (5th Cir. 1922); *William Wrigley Jr., Co. v. United States*, 75 Ct. Cl. 569, 583-84 (1932); *cf. United States v. Petty Motor Co.*, 327 U.S. 372 (1946). In part this rule derives from the notion that a lessee cannot justifiably expect

that he will be able to keep personal property on the leased premises indefinitely. *E.g., Gershon Bros. Co. v. United States, supra.* It also rests on the principle that there has been no "taking" when the lessee is free to remove the property in undamaged condition. *E.g., Springfield S.W. Ry. v. Schweitzer,* 173 Mo. App. 650, 158 S.W. 1058 (1913). There appears to be still another reason for this rule. It would be virtually impossible to be sure that a government-subsidized move would not put the condemnee in a better position than he enjoyed before the taking. In Allegheny's case, for example, transportation costs have always been a significant factor in ealculating the price to be paid by a buyer. A court would be compelled to engage in the most speculative marketing calculations to determine the difference in value between identical stockpiles of sand and gravel because of its closer proximity to the place of delivery, and then to apply this difference against the removal cost.[5] Such damages are simply too conjectural and remote from the government's taking of land to be the subject of compensation. See *In re Post Office Site, supra*

Judgment affirmed

[5] The cost of purchasing a new sand and gravel stockpile—the measure of damages which Allegheny apparently sought below—would of course be a ceiling on any award of moving costs.

Decision and Order of the United States District Court for the Western District of New York

UNITED SATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

CERTAIN PARCELS OF LAND IN CATTARAUGUS COUNTY, STATE OF NEW YORK, and SENECA NATION OF INDIANS, a body corporate, *et seq.*,

---

Civil 10, 635 *et seq.*

Sir:

Take notice of an Order, of which the within is a copy, duly granted in the within entitled action on the 4th day of May 1970, and entered in the office of the Clerk of the United States District Court, Western District of New York, on the 4th day of May, 1970.

Dated: Buffalo, New York,

May 4, 1970

ROLAND E. LOGEL,
Clerk,
U. S. District Court,
U. S. Courthouse,
Buffalo, New York 14202.

To:
H. Kenneth Schroeder, Jr.,
Attorney for Plaintiff.

To:
Arthur Lazarus, Jr.,
Benjamin C. Perreault,
Attorneys for Defendant.

FEDERAL RULES OF CIVIL PROCEDURE 77(d).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CERTAIN PARCELS OF LAND IN CATTARAUGUS COUNTY, STATE OF NEW YORK, and SENECA NATION OF INDIANS, a body corporate, *et seq.*,

Defendants.

Civil 10, 635 *et seq.*

William F. Smith, Esq., Land & Natural Resources Division, United States Department of Justice, Washington, D. C. (C. Donald O'Connor, Esq., Assistant United States Attorney, of Counsel), for the United States.

Strasser, Spiegelberg, Fried, Frank & Kampelman (Arthur Lazarus, Jr., of Counsel), Washington, D. C., Attorneys for Defendant Seneca Nation of Indians.

Congdon, Congdon & Perreault (Benjamin C. Perreault, Esq., of Counsel) Salamanca, New York, Attorneys for Defendant Upper Allegheny Sand & Gravel Company, Inc.

Condemnation proceedings were filed betwen December 3, 1963 and February 28, 1964, to acquire flowage and clearance, highway and railroad easements over lands in the Allegany Reservation of the Seneca Nation of Indians for use in connection with the Allegheny River Reservoir Project of the Department of the Army. Declarations of Taking were filed vesting title to the easements as des-

cribed therein in the United States of America on the dates the proceedings were instituted and estimated compensation was deposited into the registry of the court. At the same time, orders were entered granting to the United States immediate possession of the easement areas.

In Public Law 88-533, section 2(b) (78 Stat. 738) the Seneca Nation of Indians was given the right in condemnation proceedings "to seek an additional sum as just compensation due the Nation for damage to the sand and gravel resources within the Allegheny Indian Reservation caused by the acquisition of interests in land therein by the United States." Section 6 of the same Act reserves to the Seneca Nation all minerals, including oil, gas, sand and gravel, provided that the exploration and development of such minerals shall be consistent with the interest and land required for the project and subject to all rules and regulations of the Secretary of the Army necessary for the protection of the Allegheny River Reservoir Project.

In the same section of the Act, Congress authorized the payment of $100,000 to the Seneca Nation as full compensation for the increased expense of developing or otherwise exploiting the oil and gas subsurfaces retained by the Seneca Nation. This oil and gas interest has been reduced to judgment and payment has been made to the Seneca Nation.

Although the United States acquired easements for the project in about 10,000 acres of land within the Allegany Reservation of the Seneca Nation of Indians, the Nation has claimed additional compensation for sand and gravel in only 38 tracts of land, containing a total of 1,344.61 acres. The railroad and highway easements and temporary work areas being condemned are within the flowage easement area, except for an additional 24.59 acres being ac-

quired for highway purposes above the flowage area. The gross easement area involved in the 38 tracts is 1,369.20 acres. Fifteen of these tracts are islands in the Allegheny River and under the Act the sum of $945,573 was paid to the Seneca Nation for indirect damages, including loss of access to the sand and gravel in the river bed. Since the United States only acquired title to the aforementioned easements, the sand and gravel remain on the tracts.

The fee title to lands in the Allegany Reservation of the Seneca Nation of Indians is vested in the State of New York subject to right of occupation by the Seneca Nation. *United States v. Franklin County,* 50 F. Supp. 152, 155 (N. D. N. Y. 1943). The State of New York has filed waivers of any right to compensation as to these 38 tracts.

Settlements on the basis of the highest and best use of the individual tracts for campsites, clear and cultivable, residental, farming, island, recreational use, brush and woodland have been reached between the United States and the Seneca Nation of Indians for all of the tracts, except Tract Nos. 2604, 2645, 2776 and 2778. Partial judgments have been entered determining that the stipulated amounts are just compensation, subject to the claim of the Seneca Nation for a higher value, if any, due to the sand and gravel content of the tracts.

The condemnation actions were consolidated for trial purposes. The trial began on February 7, 1967, with the taking of testimony of Dr. Earl T. Apfel who appeared as a witness for the Seneca Nation of Indians. It was continued *sine die* until June 11, 1968, and ended on June 14, 1968. Subsequently, briefs and reply briefs were filed by the parties.

Testimony at trial established that sand and gravel deposits exist throughout the entire area. Such deposits cover much of this portion of New York State although some of the gravel lies below islands formed by deposits of silt which would have to be removed to get at the gravel. Under the terms of the taking by the government, the land lying below elevation of 1328 feet mean sea level would be permanently flooded, and the land lying above this elevation to 1365 feet mean sea level would be occasionally flooded. Since the land was intermittently flooded before the taking, the project would cause some land to be flooded to greater degrees than previously and for longer duration. The taking resulted in claims made on behalf of the Seneca Nation of Indians and other claims made on behalf of Upper Allegheny Sand and Gravel Company, Inc.

A. Claims of the Seneca Nation of Indians.

1. *Addition to Market Value of Certain Tracts Due to Sand or Gravel Deposits.*

While it is undisputed that a vast area of this part of the state contains immense sand and gravel deposits, the court must determine if the existence of such deposits increases the market value of the land. Consideration must be given to the availability of other sand and gravel in the area, location of a market, cost of removal, the number of present operators in the area, the cost of transportation to the market and other factors which would indicate that the deposits practically enhance the market value of the land.

The credible and believable evidence establishes that the sand and gravel deposits common to these tracts of land are available elsewhere in the vicinity. Although the deposits are of a very high quality, an available market nearby is lacking. The cost of transportation to the Buffalo metro-

politan area—65 miles away—is prohibitive. The area can only support a modest market for sand and gravel, and the evidence indicates that a number of producers presently in operation are meeting the demand and can continue to meet future demands for sand and gravel adequately. The court finds that sand and gravel cannot be profitably trucked over thirty miles, and that the Buffalo area contains within itself enough mineral deposits to meet the requirements for the next fifty years.

In view of these facts, the testimony offered on behalf of the defendants, to the effect that approximately fifty million cubic yards of sand and gravel could be extracted profitably and transported 65 miles to the Buffalo market over the next fifty years, is highly speculative and without objective support. Such conjectural assertions regarding future demand and market conditions are entitled to little weight, since they are too uncertain to be used as a basis for determining market value. Valuation arrived at by multiplying the estimated number of cubic yards or tons in place by some fixed amount per cubic yard or ton (with profit or royalty) has been condemned as too speculative and uncertain to be used as a basis for finding market value of land. *Georgia Kaolin Co. v. United States*, 214 F. 2d 284, 286 (5th Cir. 1954), *cert. denied*, 348 U. S. 914 (1955); *United States v. 158.76 Acres in Townshend, Vt.*, 298 F. 2d 559, 561 (2d Cir. 1963); *United States v. Glanat Realty Corp.*, 276 F. 2d 264, 265 (2d Cir. 1960). Upon the defendants rests the burden of establishing their claims by facts and a rational foundation. *Westchester County Park Comm. v. United States*, 143 F. 2d 688 (2d Cir. 1944), *cert. denied*, 323 U. S. 726 (1944); *United States v. Glanat Realty Corp., supra*. This they failed to do. There was no proof of any prospect that the land, other than the 80 acres leased to Upper Allegheny Sand and Gravel Company, Inc., would

be utilized for production of sand and gravel in the reasonable future. As a matter of fact, it is questionable whether there is a market for the unmined reserves in the 80 acres in the leased area. No sales were introduced which would have shown a demand for sand and gravel reserves in the immediate area. Opinion evidence offered by the defendants does not support a finding that the deposits of sand and gravel enhance the market value of the land except for the 80 acres in the leased area. Therefore, I find that except for the 80 acres, the market value of the land is not increased due to the sand and gravel deposits. Nor is there any factual basis or evidence which would support a finding that some land, in addition to the leased 80 acres, had an enhanced market value due to deposits of sand and gravel on such land.

2. *Land Leased to Upper Allegheny Sand and Gravel Company, Inc.*

The above finding does not apply to the 80 acres of land leased by the Seneca Nation to Upper Allegheny Sand and Gravel Company, Inc. This property was actually used by Upper Allegheny which was mining and processing sand and gravel and owned a fixed processing plant, together with two buildings on the leased premises. The lease ran for a period of ten years, from August 15, 1948 and extendible for a further period of ten years. This court, by its decision and order dated October 27, 1967, found the extension of the lease valid and in compliance with section 396(a) of Title 26, United States Code. Therefore, as of the date of the taking, December 3, 1963, the lease had a little less than five years to run.[1]

[1] Upper Allegheny's claim that it could unilaterally extend this lease until August 15, 2008, is without merit.

Both sides presented evidence as to comparable sales of sand and gravel land on the question of value. Mr. Richard Groves testified on behalf of the Seneca Nation that the comparable sales in the Buffalo and Rochester areas ranged from approximately $1000 to $3300 per acre, and he adjusted them downward to reach a value of $500 per acre for the 80 acres. Although the government relies on testimony as to sales of gravel tracts in South Dayton, New York, at $50 to $300 per acre, and in particular to a 103-acre tract at $50 an acre in 1958, the court finds, after weighing all the evidence as to comparable sales, that $400 per acre is the fair market value of the 80 acres due to its sand and gravel reserves as of the date of taking, or a total of $32,000. Of course, necessary adjustments must be made between this figure and the sum stipulated as the value of the 80 acres based on its highest and best use for other purposes.

3. *The Seneca Nation of Indians is Entitled to Compensation because of its Exemption from Real Estate Taxes. Indian Law § 6.*

The taking by the government of land having the advantage of tax exemption in the hands of the Indians is entitled to consideration. *United States v. 205.03 Acres of Land, etc.*, 215 F. Supp. 858 (W. D. Pa. 1966). The testimony indicates that in the opinion of one expert the tax benefit amounts to about 25% (Tr.-636). Although the court is of the opinion that the restraint on alienation accompanying the tax exempt status offsets to a large extent the benefit of such status, the only proof on the record is that opinion which considered that aspect. Although by its nature the loss of tax exempt status is not susceptible of exact determination, the court finds the benefit to be 25% which applies to the $32,000 awarded to the Indians for the 80 acres.

4. *Value of Lease.*

Lastly, the Indians claim compensation must be allowed for the value of their lease with Upper Allegheny Sand and Gravel Company, Inc. The lease had less than five years to run. It provided a definite royalty of at least $1500 per annum, and the testimony indicated the actual return to the Indians was approximately $3100 per annum. However, the believable evidence indicates that a purchaser of the lease would be required to spend approximately a quarter of a million dollars on equipment in order to take advantage of the mining rights. Moreover, the evidence indicates that stockpiles of standing sand and gravel could not be sold within eighteen months after the taking. Considering these facts, I find that the remaining term of the lease had no market value. Although it had a value to the Indians, its value on a fair and open market is the standard and not its value to the lessee or condemnor. *United States v. 5.42 Acres of Land, etc.*, 182 F. 2d 787 (3d Cir. 1950).

B. Claims of Upper Allegheny Sand and Gravel.

1. *Equipment.*

As previously mentioned, Upper Allegheny Sand and Gravel Company, Inc. was actually mining and processing sand and gravel on land it had leased from the Indians at the time of the taking. It had erected on this property a processing plant and two buildings. The believable evidence indicates that the plant consisted of very old machinery in a poor state of repair. Those who had viewed the operation of the plant testified that it was inefficient and very poorly engineered and that the equipment used was quite old, held together by baling wire. Although the plant was fixed on the property, it could have been removed by severing the anchor bolts from the concrete with a torch.

Upper Allegheny relies primarily on testimony indicating a replacement value of the plant of approximately $90,000 and a construction value of $64,000. However, this method of valuation did not take into consideration the cost of putting the items in condition for resale and did not consider the depreciated value or the condition of the equipment. The testimony of the auctioneer, who had considerable experience and had sold over 100 gravel plants throughout the country, is more convincing. He stated that the Upper Allegheny Plant was the smallest he had ever sold and that it was in deplorable condition. He appraised the plant at a value between $8000 and $8500, considering the condition of the equipment. There was also evidence that some vandalism had taken place on the machinery and equipment prior to the sale. Such vandalism could have been prevented by Upper Allegheny and, in any event, it was not the duty of the government to prevent such vandalism. The bulk bid on the machinery and equipment was $8500, but the piecemeal sale amounted to $9060. I find just compensation in the amount of $9060 as the amount the machinery and equipment enhanced the value of the property.

2. *Lease.*

As mentioned above, the lease of Upper Allegheny Sand and Gravel Company, Inc. had less than five years to run, and a purchaser of such a lease would be required to make large capital expenditures. I therefore find that the lease had no market value at the time of the taking.

3. *Processed Gravel.*

At the time of the government taking, there was a considerable stockpile of standing sand and gravel which could not be disposed of during the eighteen month period after the taking. The testimony was that even at $1.00 a ton, it

would cost more to remove the gravel stockpile than it was worth. For this reason, I find that the sand and gravel remaining in the stockpile have no compensable value in these proceedings. In any event, sand and gravel inventory has been held to be personal property, *Jones Cut Stone Co. v. State of New York*, 7 Misc. 1048 N. Y. Ct. Cl. (1957); *Graham v. Purcell*, 126 App. Div. 407, 110 N. Y. S. 813 (1908), and the government is not required to make compensation for personal property.

4. *Buildings.*

The two buildings which were on the land were valued by the expert on behalf of Upper Allegheny Sand and Gravel Company, Inc. at $15,000 by computing their reproduction cost and using a depreciation factor of 25% to 30%. He did not use the actual cost figures of Upper Allegheny, nor did he consider the age or life of the buildings or allow obsolescence or functional depreciation. Such a reproduction method leaves too much to opinion and speculation, *United States v. 6.87 Acres of Land in the Village of Garden City*, 52 F. Supp. 594, 597 (E. D. N. Y. 1943), *aff'd*, 147 F. 2d 351 (2d Cir. 1945), and is not convincing in light of other testimony that the condition and age of the buildings considerably affected their value. I find, after weighing all the evidence, that the buildings enhanced the value of the land by $3000, and that this sum represents just compensation for their taking

Judgment shall be entered in accordance with this decision.

/s/ JOHN O. HENDERSON,
JOHN O. HENDERSON,
United States District Judge.

DATED: MAY 4 1970.

Judgment of United States District Court for the Western District of New York Entered August 20, 1970

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

1132.50 ACRES OF LAND, MORE OR LESS, SITUATE IN CATTARAUGUS COUNTY, STATE OF NEW YORK, AND THE SENECA NATION OF INDIANS, a body corporate, *et al.*,

Defendants.

Civil Action No. 10,635.

Tracts 2602E,
2603 E-1,
2603 E-2.

FINAL JUDGMENT AS TO VALUE OF SAND AND GRAVEL DEPOSITS AND OF CLAIMS OF DEFENDANT, UPPER ALLEGHENY SAND AND GRAVEL CO., INC. AND ORDER OF DISTRIBUTION.

The issues concerning the full and fair just compensation which should be paid by the plaintiff for the takings described in the Declaration of Taking and Complaint in this action by reason of damage to the sand and gravel resources on said tracts and for the interests of the defen-

dant, Upper Allegheny Sand and Gravel Co., Inc. in said tracts having come on for trial before this Court, and the United States Attorney having appeared for the plaintiff, and Strasser, Spiegelberg, Fried, Frank and Kampelman (Arthur Lazarus, Jr. of Counsel), having appeared for the defendant, Seneca Nation of Indians, and Congdon, Congdon & Perreault (Benjamin C. Perreault of Counsel) having appeared for the defendant, Upper Allegheny Sand & Gravel Co., Inc., and testimony having been given on behalf of each of the said parties and exhibits having been introduced and admitted into evidence, and this court having made its decision, dated May 4, 1970,

Now, upon all of the foregoing, and upon all the pleadings in this action, and upon due deliberation, it is

ORDERED, ADJUDGED AND DECREED that the title to the estate taken as to Tracts 2602-E, 2603-E-1 and 2603-E-2 as set out and described in the Complaint and Declaration of Taking, is hereby confirmed in the United States of America, and it is further

ORDERED, ADJUDGED AND DECREED that the full, fair and just compensation for said takings, including the consideration of the deposits of sand and gravel thereon is as set forth in stipulations and judgments heretofore entered in this action for said tracts and as paid over to defendants in satisfaction of said judgments, except as follows:

As to eighty acres of land within said tracts, which are the subject of, and are more particularly described in a certain lease to the defendant, Upper Allegheny Sand & Gravel Co., Inc., the total full, fair, and just compensation for said tracts is the sum of $32,000.00, plus twenty-five percent of said sum which is compensation by reason of

exemption from real estate taxes, less a credit for sums previously paid to defendants and allocable to said eighty acres, stipulated by the plaintiff and the defendant, Seneca Nation of Indians, to be $4,393.15, amounting in all to $25,606.85.

As to a certain gravel processing plant which was erected on said eighty acres of land, the full, fair and just compensation for said plant is the sum of $9,060.00.

As to the buildings of the defendant, Upper Allegheny Sand and Gravel Co., Inc., situated on said eighty acres of land, the total, full, fair and just compensation for said buildings is the sum of $3,000.00, and it is further

ORDERED, ADJUDGED AND DECREED that the aforementioned amounts with interest as hereinafter provided constitute the full, fair and final just compensation for any and all claims, demands and damages arising out of or in connection with the takings herein, excepting claims, demands and damages not previously resolved, if any, relating to oil and gas.

And there having been deposited with the Clerk of this Court, to the credit of this action, and remaining on deposit, the following sums:

For land value, Tract 2602E	$ 195.00
For land value, Tracts 2603E-1, E-2	5485.00
For structures and equipment (Upper Allegheny)	1300.00
On sale of processing equipment	7920.25

IT IS ORDERED, ADJUDGED AND DECREED that a deficiency judgment, in the sum of $29,926.85, with interest thereon from December 3, 1963 is entered in favor of the Seneca Nation of Indians and against the United States of

America, and that a deficiency judgment in the sum of $2839.75, with interest thereon from December 3, 1963 is entered in favor of Upper Allegheny Sand and Gravel Co., Inc., and against the United States of America, and it is further

ORDERED AND ADJUDGED that, upon the deposit of said deficiencies, with interest, the judgment granted herein is satisfied, and the Clerk of this Court shall issue registry drafts payable as follows:

Seneca Nation of Indians, $35,606.85, plus the interest on said deficiency of $29,926.85.

Upper Allegheny Sand & Gravel Co., Inc., $12,060.00, plus the interest on said deficiency of $2839.75.

And it is further, ORDERED, ADJUDGED AND DECREED that the other named defendants, not including those who may still process claims relating to oil and gas, have and take nothing further in this action as to the above-named tracts by reason of this suit.

Dated at Buffalo, New York, August 20, 1970.

/s/ JOHN O. HENDERSON,
United States District Judge.

IN THE

Supreme Court of the United States

No. 71-24

UPPER ALLEGHENY SAND & GRAVEL CO., INC.

Petitioner,

v.

UNITED STATES OF AMERICA, and
SENECA NATION OF INDIANS,

Respondents.

MEMORANDUM OF SENECA NATION OPPOSING CERTIORARI

Respondent Seneca Nation of Indians represents to the Court as follows:

The sole question presented in the petition for a writ of certiorari which concerns the Seneca Nation is "The measure of just compensation due a lessee under a lease having a short remaining term...." Pet., p. 9. The rule for valuing

a leasehold interest taken in Federal condemnation proceedings was established by this Court in *United States v. Petty Motor Co.*, 327 U.S. 372 (1946), and petitioner herein actually is attempting just to upset the application of that rule by the courts below. Since the real issue involved is factual, and not legal, the case clearly does not warrant further review.

Respectfully submitted,

Arthur Lazarus, Jr.
Attorney for Respondent
Seneca Nation of Indians

Of Counsel:

Fried, Frank, Harris,
Shriver & Kampelman

CERTIFICATE OF SERVICE

I, Arthur Lazarus, Jr., attorney for Seneca Nation of Indians, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that three copies of respondent's Memorandum Opposing Certiorari were mailed, first class postage prepaid, this day of , 1971, to each of the following attorneys: Honorable Erwin N. Griswold, Solicitor-General, Department of Justice, Washington, D.C. 20530, counsel for respondent United States of America, and to Benjamin C. Perreault, Congdon, Congdon & Perreault, 107 Main Street, Salamanca, New York 14779, attorneys for petitioner and that all parties required to be served were served.

Arthur Lazarus, Jr.
Attorney for Respondent
Seneca Nation of Indians

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-24

UPPER ALLEGHENY SAND & GRAVEL CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion (Pet. App. 26–35) and final judgment (Pet. App. 36–39) of the district court are unreported. The opinion of the court of appeals, reported at 441 F. 2d 356, appears at Pet. App. 17–24.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1971. The petition for a writ of certiorari was filed on July 6, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

440-801—71

QUESTION PRESENTED

Whether, on the facts of this eminent domain case, the district court's findings of valuation were correct.

STATEMENT

Petitioner, Upper Allegheny Sand & Gravel Co., Inc. (Allegheny), held a sand and gravel lease and operated a sand and gravel plant on 80 acres of the Allegheny Indian Reservation of the Seneca Nation of Indians. On December 9, 1963, the United States brought a condemnation proceeding to acquire flowage and other easements over 1,132.50 acres, including the leased land.

In adjudicating the amount of damages due petitioner, the district court found the leasehold interest to be of no value because the additional investment needed to exploit the resources exceeded the value of the possible exploitation (Pet. App. 33–34). The court also found petitioner's stockpile of sand and gravel valueless because the cost of removal exceeded the resale value (Pet. App. 34–35).

An experienced appraiser valued petitioner's small, dilapidated plant at $8,000 to $8,500. The bulk bid on the machinery and equipment in place was, in fact, $8,500. By breaking the equipment into lots, however, $9,060 was realized by the auctioneer in a piecemeal sale. Accordingly, the court awarded the higher sum of $9,060 as just compensation to Allegheny (Pet. App. 33–34). The court concluded that the cost-less-depreciation approach was an improper method of

valuation of the buildings. For these, the court awarded $3,000 (Pet. App. 35).

The court of appeals affirmed. It ruled that the sand and gravel stockpiles were noncompensable personalty, and not fixtures, under both state and federal law (Pet. App. 23–25), and that the lease had no value in view of the investment required (Pet. App. 22).

While noting its earlier decisions that the condemnee need not ordinarily be content with salvage value for fixtures, the court stated that where, as here, the equipment is not economically well-suited to the site, a piecemeal sale may result in the higher and fairer valuation. The court found no error in the district court's determination of the value of the buildings, which was within the range of the testimony (Pet. App. 21–22).

ARGUMENT

The decision is correct and presents no conflict with any decision of this Court or other court of appeals and no question warranting further review. As is plain from the opinions of the court of appeals (Pet. App. 17–24) and the district court (Pet. App. 25–35), the issues raised before the district court, the court of appeals and here are almost exclusively factual. The governing principles of federal eminent domain law were followed. See *United States* v. *Miller*, 317 U.S. 369, in general, and *United States* v. *General Motors Corp.*, 323 U.S. 373, and *United States* v. *Petty Motor Co.*, 327 U.S. 372, in support of the court of appeals' treatment of the leasehold interest.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
SHIRO KASHIWA,
Assistant Attorney General.
JACQUES B. GELIN,
DENNIS M. O'CONNELL,
Attorneys.

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